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No.84-433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS

Petitioners

CORRECTED COPY

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO a/k/a/ JOHN DOE, Sr., as he is next friend of Michael Panico a/k/a JOHN DOE, Jr.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE FOR THE DEVELOPMENTAL DISABILITIES LAW CENTER, CENTER FOR LAW AND EDUCATION, MASSACHUSETTS ADVOCACY CENTER, FEDERATION FOR CHILDREN WITH SPECIAL NEEDS, ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, EPILEPSY FOUNDATION OF AMERICA, NATIONAL SOCIETY FOR CHILDREN AND ADULTS WITH AUTISM, AND THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS

Richard F. Howard
Stanley J. Eichner
Developmental Disabilities Law Center
11 Beacon Street #925
Boston, MA 02108
(617) 723-8455

Kathleen B. Boundy
Margo Haist Wallack
Center for Law and Education
6 Appian Way
Cambridge, MA 02138
(617) 495-4666

Counsel for Amici Curiae

Kotin, Crabtree and Strong
61 Chatham Street
Boston, MA 02109
(617) 227-7031

Thomas A. Mela
Massachusetts Advocacy Center
76 Summer Street, 5th Floor
Boston, MA 02110
(617) 357-8431

Of Counsel

73pp

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS Petitioners v. DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO a/k/a/ JOHN DOE SR., as he is next friend of MICHAEL PANICO, a/k/a/ JOHN DOE,JR. Respondents	No.84-433

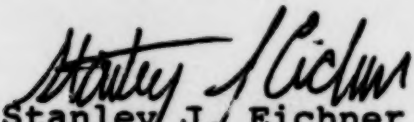
MOTION FOR LEAVE TO
FILE BRIEF, AMICUS CURIAE

The Developmental Disabilities Law Center, Center for Law and Education, Massachusetts Advocacy Center, Federation of Children With Special Needs, Association for Children and Adults with Learning Disabilities, Epilepsy Foundation of America, Association for Persons With Severe Handicaps, and the National Society

for Children and Adults With Autism respectfully move this Court for leave to file the accompanying brief amicus curiae. These organizations have had extensive involvement with the enactment and implementation of the Education of All Handicapped Children Act and various state special education statutes.

Amici believe that the Court would benefit from the arguments of these organizations which have a broader perspective than the parties herein and extensive practical experience in the implementation of the EAHCA. These organizations' proposed amicus brief is intended to be filed in support of respondents in this case who have consented to the filing of this brief and whose consent is being filed herewith. Petitioners have declined to consent.

Respectfully submitted,



Stanley J. Eichner
Developmental Disabilities
Law Center, Inc.
11 Beacon Street, #925
Boston, MA 02108
(617) 723-8455

Attorney for Amicus Curiae

Date: February 15, 1985

IN THE
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OCTOBER TERM, 1984

No. 84-433

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE

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STATEMENT OF INTERESTS

The Developmental Disabilities Law Center, Inc. (DDLC) is a private, non-profit organization established and funded pursuant to 42 U.S.C.§§6000 et seq. 6012 ("D.D. ACT") to protect and advocate for the rights and interests of developmentally disabled persons in Massachusetts. DDLC has represented numerous parents and children in cases involving the application of state and federal special education statutes in administrative and judicial proceedings. The Massachusetts Department of Social Services has contracted with DDLC to provide representation for developmentally disabled children. As a result of this contract, DDLC has made attention to special education issues one of the highest priorities of the agency.

The Center for Law and Education, Inc. serves as the national support center on education issues for the legal services pro-

gram. It is primarily funded by the Legal Services Corporation, Washington, D.C. to provide assistance to local legal services programs and other attorneys representing low-income clients in litigation involving education issues. Since the enactment of the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., the Center has been actively engaged in interpreting its regulatory provisions and otherwise seeking full implementation of the rights of disabled students. The Center has published an extensive manual, Special Education: Guidelines for Advocates, draft edition 1980, revised 1982; articles, including "Discipline of Handicapped Students;" and articles in Clearinghouse Review concerning the status of special education law. The Center has and is currently serving as co-counsel in actions raising claims under the EAHCA, and has also participated as amicus curiae in a number of cases before the federal appellate courts.

The Massachusetts Advocacy Center is a sixteen year-old private, nonprofit organization exclusively concerned about children throughout the Commonwealth of Massachusetts who may be excluded from school or from services to which they are entitled. The Center has litigated dozens of administrative appeals and numerous state and federal court actions on behalf of the families of handicapped children entitled to services under the Education for All Handicapped Children Act (P.L.94-142, 20 U.S.C. §1401 et seq.). The Center was asked to testify before a committee of the Congress on the status of implementation of P.L.94-142, and has also testified before a committee of the Massachusetts Legislature and before the Massachusetts Board of Education on the same subject. Employees of the Center are lawyers, educators, and social workers knowledgeable about the needs of handicapped students.

The Federation for Children With Special Needs is a not-for-profit, tax-exempt organization which is a center for parents of handicapped children and parent organizations working together to assist handicapped children and their families in securing appropriate services. The Federation's Board of Directors is composed of the following associations which collectively have approximately 15,000 members and represent the interests of over 100,000 handicapped children and their families: Children in Hospitals, Massachusetts Association for Children With Learning Disabilities, Massachusetts Association for Retarded Citizens, Massachusetts Parents Association for Deaf and Hard of Hearing, Massachusetts Parents Association of Deaf-Blind Children, Massachusetts Spina Bifida Association, National Society for Autistic Children (Mass.Chapter), New England Parent Association for Visually

Handicapped Children and Adults, Parents and Children Together, and Tuberous Sclerosis Association of America (Mass.Chapter).

The Association for Children and Adults With Learning Disabilities (ACLD) is a volunteer association with over 60,000 members in 800 chapters in the 50 states and the District of Columbia. The membership is composed of learning disabled individuals, parents of the learning disabled, and professionals from fields such as education and psychology who work with learning disabled people. According to the United States Department of Education, learning disabled students comprise the largest group of handicapped children in the United States. ACLD's paramount purpose is promoting the education and welfare of those with learning disabilities.

The Epilelpsy Foundation of America (EFA) is the only national, charitable, non-profit voluntary agency in the United

States specifically dedicated to the welfare of children and adults with epilepsy. Founded in 1968, EFA currently has over 8000 members and approximately 80 state and local affiliates throughout the country. The foundation has a longstanding commitment to secure the legal rights of persons with epilepsy and to otherwise improve the lives of the two million Americans with the condition. It seeks to do this through research, vocational programs, public information and education, professional education and advocacy.

The National Society for Children and Adults with Autism (NSAC) is the only national volunteer organization devoted solely to the well being of individuals with autism. NSAC is committed to eliminate this disorder through research, public and professional education, and development of habilitative services. The organization was founded in 1965 and was incorporated in Washington, D.C. on December 28,1968. It

is a national membership organization of parents and individuals concerned with autism. NSAC maintains a community-based network of 175 chapters and state societies with 6,000 members nationwide. The organization is governed by a national board of 17 directors elected by the general membership, complemented by a Professional Advisory Board composed of scientific investigators, educators and experts in research disciplines relevant to autism.

The Association for Persons with Severe Handicaps (formerly the American Association for the Education of the Severely/Profoundly Handicapped) was founded in 1974 to develop, advocate and implement the provision of educational and habilitative services for severely and profoundly handicapped individuals guaranteed to them through the Education of All Handicapped Children Act, 20 U.S.C. §1401 et seq. and related federal laws.

TASH has more than five thousand members who include parents, educators, therapists, doctors, and other professionals. TASH members work on a daily basis in schools, and community programs to reverse historic patterns of segregation and exclusion and to see to it that severely disabled people are included in the national life. One of TASH's stated objectives is the "rapid termination of living environments and educational/vocational/recreation services that segregate, regiment and isolate persons from the individualized attention and sustained normalized community interactions necessary for maximal growth, development, and the enjoyment of life."

All of the above organizations have been deeply involved in the passage and implementation of state and federal laws for the handicapped, including most notably for purposes of the present case, P.L. 94-142 and its state analogues. They are

participating here as amici curiae because of their concern that a decision adverse to the respondents would severely impair the ability of many parents of handicapped children to protect the interests of their children during lengthy due process proceedings and would effectively render useless to those parents the extensive procedural system mandated by P.L.94-142 and affirmed by the decision of this Court in Board of Education v. Rowley, 458 U.S.176 (1982).

STATEMENT OF FACTS

The amici adopt the statement of facts presented by the Respondents.

SUMMARY OF ARGUMENT

This case presents important questions regarding the role of parents in the education of handicapped students and the scope of judicial authority to enforce the Education of All Handicapped Children Act (EAHCA). Amici point out that Congress enacted the EAHCA to protect the equal protection rights of handicapped children and that the assuring of appropriate education for handicapped children was the primary and underlying purpose of the Act. The principal consideration in understanding the statutory scheme and in interpreting specific provisions of the EAHCA should be the Congressional intent of assuring appropriate education.

Interpreting 20 U.S.C. §1415(e)(3), the "status quo" provision of the EAHCA, as an absolute prohibition against changing a handicapped child's program during appeal

proceedings would be inconsistent with the appropriate education goal of the Act and a misreading of the statutory scheme. In enacting Section 1415(e)(3), Congress intended to prevent exclusion of handicapped children from school or retaliation for use of the Act's procedural protections. Congress did not intend to enter the constitutionally sensitive area of parent-child relations and to prohibit a parent's decision to place a child, handicapped or not, in a private school for which the parent was unable to pay. A determination of whether parents may be able to receive reimbursement for tuition payments is properly analyzed under another provision, Section 1412(e)(2). Furthermore, by enacting Section 1415(e)(3), Congress did not intend to eliminate the equitable powers of the courts to issue preliminary injunctive relief during special education proceedings

in circumstances when a parent could show likelihood of success on the merits and irreparable harm if temporary injunctive relief were not given.

The primary flaw in petitioner's argument and the analysis by some of the courts which have considered the scope of relief under 20 U.S.C. §1415(e)(2) is they pose the question as whether or not "damages" are available. The authority to "grant" such relief as the court determines is appropriate" provided by Section 1415(e)(2) is more appropriately analyzed as a grant of "equitable" authority which should be interpreted flexibly to allow the courts to further the Congressional objectives of the EAHCA. Decisions of this Court make clear equitable relief traditionally includes "restitution" necessary to make an injured party whole. Restitution in the form of reimbursement of tuition expenses is an appropriate element of equitable

relief in an EAHCA case and furthers the goals of the Act. A restitution remedy would not place a burden on school departments any greater than that intended by Congress and would serve the purpose of placing prevailing parents in the position they would have been in had education officials met their EAHCA obligations from the beginning.

ARGUMENT

I. THE PURPOSE OF THE EACHA WAS TO VINDICATE THE EQUAL PROTECTION RIGHTS OF HANDICAPPED CHILDREN BY ASSURING THAT THEY RECEIVE A FREE APPROPRIATE EDUCATION.

Recognizing that "for years handicapped children of this country have been kept in the dark, deprived of a free,full public education" 121 Cong.Rec.H37027 (daily ed., Nov.18,1975)(remarks of Rep.Gude), Congress enacted the Education for All Handicapped Children Act, 20 U.S.C. §1400 et seq. [hereinafter EAHCA] because the rights of disabled children were not being adequately protected by the states and local school districts. The Act's intent was to ensure for handicapped children the "educational opportunity that has been long considered the right of every other American child." 121 Cong.Rec. S20427 (daily ed.,Nov.19,1975)(remarks of Sen.Randolph). From the legislative history of the EAHCA, it is clear that Congress acted in responds to a number of judicial

decisions[1] that recognized the rights of handicapped children to equal educational opportunity under the Fourteenth Amendment of the U.S. Constitution.[2] The EAHCA not only "guaranteed them a right to education but. . .[provided] adequate provisions which will protect those rights and guarantee that a child will not be improperly labeled or improperly placed in an educational setting which will not suit his or her unique educational needs."121 Cong.Rec.H37026

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[1] See Pennsylvania Association for Retarded Citizens v. Pennsylvania, 343 F.Supp.279 (E.D.Pa.,1972), modifying 334 F.Supp.1257)(E.D.Pa.1971)(all mentally retarded persons are capable of benefitting from a program of education and training); Mills v. Board of Education, 348 F.Supp.866 (D.D.C.1972) (available funds must be expended equitably so that no child is excluded from a publicly-supported education consistent with his need and ability to benefit therefrom).

[2] See S.Rep.No.168, 94th Cong., 1st Sess., (hereinafter "S.Rep.") 5-7, 13, 17, 22-24, reported in 1975 U.S.Code Cong.& Admin.News 1425, 1429-31, 1433, 1437, 1440-41, 1446-48.

(daily ed.,Nov.18,1975)(remarks of Rep.Quie). Prior to the landmark cases[3] preceding Congressional involvement, the history of handicapped children had been one of institutionalization and arbitrary exclusion. Handicapped children had been excluded from the public schools on the theory that they could not benefit from educational programs. In its findings, Congress noted in the preamble to the EAHCA that there were more than 8 million children in the United States, more than half of whom were not receiving appropriate educational services and more than one million of whom were excluded entirely from the public school system.[4] Accordingly, Congress found it "in the national interest that the Federal Government assist state and

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[3] See note 1, supra.

[4] Act of Nov.29,1975, Pub.L.No.94-142, §§3(b)(1)(3)(4), 89 Stat.774 (Congressional statements and declarations), see 20 U.S.C. §1400 for further findings.

local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." 20 U.S.C. §1400(b)(9).

As a condition of receipt of federal financial assistance under the EAHCA the state educational agency must insure that all handicapped school-aged persons receive all rights mandated by the EAHCA, including their right to a "free appropriate public education." 20 U.S.C. §1412(1), 1414(a)(C)(ii), 34 C.F.R. 300.2, 300.121. The policy for provision of an appropriate education must be reflected in the state plan submitted to and approved by the Commissioner of Education. 20 U.S.C. §§1412, 1413. Education is to be made available to children in private as well as public schools "at no cost to their parents or guardian." 20 U.S.C. §§1401(18)(A), 1413(a)(4)(B)(i); 34 C.F.R. 300.4(a), 300.14, 300.401. The

Act also requires that the free appropriate public education be tailored to the unique needs of the handicapped child by means of an individualized education program (IEP). 20 U.S.C.§§1401(19), 1414(a)(5); 34 C.F.R. 300.340-300.349.

It is clear from the legislative history that the primary underlying purpose of the EAHCA was to assure appropriate services for handicapped children. See, e.g., S.Rep.16, 1975 U.S.Code Cong.& Admin. News 1440. The structure of the Act and legislative history show that Congress incorporated into the Act related policies, all of which are meant to assure implementation of the ultimate goal - an appropriate education for handicapped children.

For example, the heavy emphasis on procedural protections including parental participation, evidence a congressional policy that parents play a major role in

the decision-making process. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S.176, 205 (1982). As this court found in Rowley, the substantial parent participation requirements of the Act were intended to insure that appropriate education services are provided to handicapped children. Id., at 209.

Another example is the "mainstreaming" policy enunciated in the Act. See 20 U.S.C. §1415(5)(B). While petitioners imply this as preference of public school placement over private school placements designed to save money, this reading is belied by the statutory language and by the legislative history. The Act requires that to the maximum extent appropriate, handicapped children, including those in private facilities, be educated with nondisabled children. 20 U.S.C. §1412(5). The legislative history confirms that the Congressional concern,

represented by the mainsteaming policy, was not to protect the school treasury,but to assure that handicapped children, wherever they receive educational services, receive them as much as possible along side of non-handicapped children. See S.Rep.8, U.S. Code Cong.& Admin.News 1433; S.Conf.Rep. 94-455, 1st Sess.(hereinafter "S.Conf.Rep.") 30, reported in 1975 U.S.Code Cong. & Admin. News, 1483. Congress was adopting the lesson of the Mills case that the harm of segregation in education programs, forbidden for racial minorities by this Court in Brown v Board of Education, 347 U.S.483 (1954), was also constitutionally unacceptable for handicapped children. Mills, supra, 348 F.Supp. at 875. By requiring integration of handicapped children to the maximum extent feasible, whether in public or private programs, Congress intended that handicapped children have the opportunity to interact with and to learn from nonhandicapped students so

that these children with special needs could "increase their independence" and "become productive citizens." See S.Rep. 9,U.S.Code Cong.& Admin.News, 1433. Viewed in this perspective, the "mainsteaming" requirement becomes part of, not at odds with, the "appropriateness" requirement and allows a more coherent view of how these policies are to work together.

A final example of related policies is the policy of minimizing unnecessary disruption represented by the "status quo" provisions of 20 U.S.C. §1415(e)(3). See discussion infra. As we discuss in part II of this brief, preventing unnecessary disruption was only one of the means that Congress employed to address the "evil" of exclusion and to prevent retaliation for use of the appeals process. The overall legislative goal was assuring appropriate services.

In each example, parental participation, mainsteaming, and nondisruption, identifiable Congressional policies in the EAHCA can be interpreted in a wide variety of ways standing alone. However, when viewed as elements of and contributors to the overall Congressional policy of assuring appropriate educational services for handicapped children, the choices of interpretation are substantially reduced. This Court should be very suspicious of any proposed interpretation of EAHCA policies or provisions that do not relate directly to the underlying goal of assuring appropriate education. With this in mind, we urge this Court to uphold the decision of the Court of Appeals below on the issues accepted by this Court for review.

II. SECTION 1415(e)(3) OF THE EAHCA IS NOT A BAR TO PARENTAL REMOVAL OF A CHILD FROM A PUBLIC SCHOOL PROGRAM

Amici believe that in enacting Section 1415(e)(3), Congress intended to prevent education authorities from excluding or retaliating against handicapped students or unnecessarily disrupting an educational program during the statutory appeals process and did not intend to displace the traditional parental authority to choose to place their children in private schools. See Town of Burlington, supra, 736 F.2d 773 (1st Cir.1984). See also Parham v. J.R., 442 U.S.584, 602 (1979); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). Section 1415(e)(3) is simply irrelevant to a parent's decision to move their child, handicapped or otherwise, to a private school program which the parents are willing to pay for themselves. Furthermore, even if review of Section 1415(e)(3) was relevant, state administrative hearing officers and

and federal trial court judges are not barred by section 1415(e)(3) from allowing a change in public funded placements in certain limited circumstances.

A. Congress intended 20 U.S.C. §1415(e)(3) to prevent exclusion or retaliation by local school officials and to prevent unnecessary disruption of a child's educational program during appeal proceedings.

The key to enforcing any individual disabled child's right to a free appropriate public education is found in student and parent involvement guaranteed by the procedural protections of the EAHCA, 20 U.S.C. §1415. As this Court recognized in Board of Education v. Rowley, parent involvement is critical to the successful implementation of the Act. 458 U.S. at 208-209. Effec-

tuating the right to a free appropriate education depends to a significant degree on the ardor with which parents pursue their children's rights. Id., at 208. The Act grants parents full access to examine all records relating to their child's evaluation and educational placement, 20 U.S.C. §1412 (2)(D); 34 C.F.R. 300.562, the right to written notice before the school district initiates, changes, or refuses to initiate or change a child's education program. 20 U.S.C. §1415(b)(1)(C),(D); 34 C.F.R. 300.504-300.505. Moreover, if the child's parents are unknown or unavailable, the state must name a "surrogate parent" to take on the parental role of protecting the child's rights. 20 U.S.C. §1415(b)(1)(B); 34 C.F.R. 300.514.

Throughout the due process proceedings, the child is protected by Section 1415 (e)(3). This section states:

> During the pendency of any proceedings conducted pursuant to this section, [section 1415] unless the state or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Section 1415(e)(3), sometimes referred to as the "stay put" or "status quo" provision is an integral part of the due process rights provided by the EAHCA to protect disabled children and their parents. Stuart v. Nappi, 443 F.Supp.1235 (D.Conn.1978). Enactment of this provision reflects Congressional awareness of the need in circumstances where a child is not suffering irreparable harm in the current placement to have an orderly system for meeting the child's needs during the appeal process. Because the Act is designed to provide each disabled child a free appropriate public

education through the joint process of school personnel and parents developing an individual education program, disagreements necessarily occur. As designed, Section 1415 (e)(3) protects children from becoming pawns in any dispute and from any retaliatory action by local school authorities. Cox v. Brown, 498 F.Supp.823 (D.D.C.1980). By thus preventing interruption and the concomitant risk of a setback in the child's development,[5] Section 1415(e)(3) seeks to minimize any detrimental effect of delay in resolving whatever issue is in dispute. Tokarcik v. Forest Hills School District, 665 F.2d (3rd Cir.1981)(court relied upon §1415 (e)(3) to undercut state's argument as to

[5] Interruption of a disabled child's educational program may lead to a regression of that child's learning abilities. Armstrong v. Kline, 476 F.Supp. 583, 592-94 (E.D.Pa.1979), aff'd in part sub nom Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3rd Cir.1980), cert. denied, 452 U.S.968 (1981); Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp.1263, 1272-73 (N.D.Ga.1981), aff'd, 716 F.2d 1565 (11th Cir.1983) vacated and remanded 104 S.Ct.3371 (1984) on remand 740 F.2d 902 (11th Cir.1984).

the need to apply a limited 30 day state appeals period to claims under EAHCA).

However, there is no evidence that Congress intended Section 1415(e)(3) to displace traditional parent choice to place a child in a private school. 20 U.S.C. §1413(a)(4)(B); 34 C.F.R.300.401, 300.403 and comments thereto. The Fourth Circuit's assertion that Section 1415(e)(3) should be "taken literally" to prevent parents from obtaining a private school education for their children, Stemple v. Board of Education, 623 F.2d 893, 897-98 (4th Cir.1980), cert. denied, 450 U.S.911(1980) "did not rely on either the Act's legislative history or the structure and purposes of the Act as a whole," Burlington, supra, 736 F.2d at 797[6] nor did it take into account the place of

[6]The Seventh Circuit found the Stemple reading of Section 1415(e)(3) to be unpersuasive since they were "certain that parents have the right to move their handicapped children to private schools." Anderson v. Thompson, 658 F.2d 1205, 1209 (7th Cir.1981).

parental decision in our system of government. See Parham, supra, 442 U.S. at 602. ("Our constitutional system long ago rejected any notion that a child is the mere creature of the state and on the contrary, asserted that parents generally have the right coupled with the high duty to recognize and prepare [their children] for additional duties.") Quoting, in part, Pierce v. Society of Sisters, supra, 268 U.S.at 535. It is simply inconceivable that Congress without being substantially more explicit intended to enter this sensitive area to prohibit the parent of a handicapped child from doing what the parent of a nondisabled child can do, i.e., choose to pay for a private school program.[7] Such a rigid

[7] Whether the parent can be later reimbursed for that program in some circumstances is an entirely separate question which is properly resolved by an analysis of 20 U.S.C. §1415(e)(2). See discussion, infra; Anderson, supra, 685 F.2d at 1209.

absolutist reading "treats special needs students as though they were commodities able to be warehoused until the termination of in rem proceedings." Burlington, supra, 736 F.2d at 798, and is inconsistent with the central goal of the Act.

> We do not believe that Congress intended to freeze an arguably inappropriate program for the three to five years of review proceedings. To construe (e)(3) in this manner would thwart the express central goal of the Act; provision of a free appropriate education to disabled children. §1412(1)(emphasis added). Doe v. Brookline, 722 F.2d 910, 918 (1st Cir.1983)

The circumstances of the case at bar provide an excellent example of why Stemple's "literal" reading cannot stand. At the time the dispute arose, the child was in a program that all parties agreed was inappropriate; the only question was to which new program should the child be moved. See Burlington, supra, 736 F.2d at 799. Congress did not intend

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any handicapped child to remain in such a placement for more than 6 years of review proceedings.

When a school system cannot provide an appropriate education for a disabled child within the public schools, the EAHCA expressly authorizes a private placement which must be without cost to the parent. 20 U.S.C. §1413(a)(4)(B). If the child who is placed by his parents in a private placement has available a free appropriate public education, the public agency is not required to pay for the child's private educational placement. 34 C.F.R. §300.403(a). Disagreements between the parent and the public agency concerning the availability of an appropriate program for the child and the question of financial responsibility are subject to due process proceedings

under the Act. 34 C.F.R.300.403(b). The parents-respondents here properly initiated administrative due process proceedings. During the pendency of those proceedings, they placed their son in a private placement and assumed the risk of financial loss based on a belief that they would be vindicated. Section 1415(e)(3) is not at issue and cannot be used to bar parents seeking to exercise their rights under Section 1415(b) and (e).

B. Even if review of Section 1415(e)(3) of the EAHCA were at issue, preliminary injunctive relief is available for a parent who can establish that failure to move a child from an inappropriate educational program will cause irreparable harm to the child.

Although parents with the financial means to pay for a private placement may be able to exercise their prerogatives to choose an alternative private school for their children, there will frequently be occasions when families cannot afford the substantial

tuition necessary to obtain appropriate services for their children during the appeals process. During the period between a decision in favor of parents by the State Education Agency and final judicial resolution, Section 1415(e)(3) is no bar to change in the publicly funded program because the statute expressly exempts situations when the "State. . .education agency and the parents otherwise agree." 20 U.S.C. §1415(e)(3). See Blazejewski v. Board of Education, 560 F.Supp.701 (W.D.N.Y.1983)(citing, inter alia, Bureau of Education for the Handicapped policy letter, 211 Education for the Handicapped Law Report 28 (1978) [Appendix, p.A-1]. In other situations parents may need court intervention to require a change of educational placement necessary to prevent irreparable harm to the handicapped child.

There is no evidence of Congressional intent to rely on 20 U.S.C. §1415(e)(3) as

a means of denying relief or limiting judicial intervention favoring disabled children in their educational pursuits. As the Court of Appeals for the First Circuit correctly determined in Doe v. Brookline, supra, Section 1415(e)(3) cannot be construed "to preempt judicial powers of equity and to establish in their stead an absolute freeze on interim placement, program, or services . . ." Section 1415(e)(2) expressly authorizes district courts to provide all "appropriate" relief, including the power to issue preliminary injunctive relief in the appropriate exercise of discretion. Clearly, in the absence of a plain Congressional intention to withdraw them, traditional equity powers remain in the district court to enforce the Act. Brookline, at 916, citing Weinberger v. Romero-Barcelo, 456 U.S.305, 313 (1981); Porter v. Warner Holding Co., 328 U.S.395,398 (1946). See discussion, infra.

While Section 1415(e)(3) should continue to be construed to create a statutory duty for maintenance of the status quo, this interpretation will not bar a court from exercising its traditional equity powers, and as a matter of extraordinary relief, modifying a current educational placement when necessary to prevent irreparable injury generally.

The status quo provision must be read in the context of the Act as a whole. The fundamental objective of the EAHCA is to assure each disabled child a "free appropriate public education." 20 U.S.C. §1412(1); 121 Cong.Rec.37415 (Nov.19,1975)(remarks of Sen.Williams, principal author of Act). To construe Section 1415(e)(3) in a manner which would freeze a disabled child in a concededly inappropriate program thwarts the purpose of the Act. See Burlington, supra, 736 F.2d at 797. One district court aptly

described the relationship between the court's equity power and Section 1415(e)(3) in rejecting the argument that Section 1415(e)(3) acted as a "statutory bar" to its changing two disabled students' placements while the dispute was still pending:

> It defies comprehension to find Congressional intent in this statute [§1415(e)(3)] which would result in the denial of equitable relief to the vulnerable in an instance when the plaintiffs have been able to demonstrate the substantial likelihood that the educational authorities have failed to comply with the mandates of the Act and where patent irreparable harm will occur absent prompt judicial relief. Cox v. Brown, 498 F.Supp. 823, 827 (D.D.C.1980).

In a number of instances courts have properly exercised their equity powers under 20 U.S.C. §1415(e)(2) to modify or change the "current educational placements" of disabled students when school districts have refused access to the evaluation and placement process authorized by the EAHCA, e.g. Quackenbush v. Johnson City School District, 716 F.2d 141 (2d Cir. 1983) cert.denied 104 S.Ct.1426 (1984);

Blazejewski v. Board of Education of Allegheny, 560 F.Supp.701 (W.D.N.Y.1983); or when a district not having a public placement available has, nonetheless, failed to provide an appropriate private placement. Parks v. Pavkovic, 536 F.Supp.296 (N.D.Ill.1982); North v. District of Columbia Board of Ed., 471 F.Supp.136 (D.D.C.1979).

Injunctive relief must be available to effectuate the purpose of the EAHCA. It is, nonetheless, a very limited remedy which is insufficient to protect the interests of children who are in inappropriate placements during the appeals process. Courts will be reluctant to intervene prior to the conclusion of administrative proceedings except in extreme cases. Their refusal will be based on the EAHCA's emphasis on exhaustion of adminstrative remedies and on the heavy burden the parent would bear to prove a probability of success on the merits

before a decision by a hearing officer.[8] The Court of Appeals for the First Circuit even took care to admonish that "we are not authorizing courts routinely to reevaluate or enforce the final adminstrative decision regarding placement on a motion for preliminary injunction." Brookline, supra, 722 F.2d at 919.

The First Circuit properly analyzed the statutory purposes and structure of the EAHCA and found that Congress intended to allow courts to retain their traditional equity powers to grant preliminary injunctive relief to require a change to an appropriate publicly funded education program, when to do otherwise would risk irreparable harm to the handicapped child. Brookline, supra, 722 F.2d at 919. The Court should adopt this interpretation of the Act.

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[8] Following the decision of the hearing officer and as part of a court appeal, preliminary injunctive relief would be a more realistic remedy since the court would have the decision of the hearing officer to enable it to make a judgment of irreparable injury. Also the court would have jurisdiction of the appeal and would not be undercutting the administrative process.

III. THE EAHCA PROVIDES FOR BROAD EQUITABLE RELIEF, INCLUDING REIMBURSEMENT OF TUITION AND RELATED EXPENSES NECESSARILY INCURRED BY PARENTS TO OBTAIN APPROPRIATE SPECIAL EDUCATION FOR THEIR CHILD

A. Congress granted broad powers to the courts to effectuate the statutory objectives of the EAHCA

This Court has found that Congress enacted the EAHCA to vindicate the equal protection rights of millions of handicapped children in this country who were not receiving adequate special education services. Smith v. Robinson, 104 S.Ct.3457, 3468 (1984).[9] In order to enforce the rights provided in the statute, Congress required the states to establish an administrative hearing process which would give parents and students an opportunity to present complaints re-

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[9] The Court cites legislative history including Senate Report 94-168:

> It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws. U.S.Code Cong.& Admin.News 1975, p.1437.

garding any matter relating to the provision of special education of the student. 20 U.S.C. §1415(b)(1)(E). A party aggrieved by the decision of the administrative hearing officer may bring a civil action in state or federal court, which court shall hold a hearing and "grant such relief as the Court determines is appropriate." 20 U.S.C. §1415(e)(2). This Court has held that the reviewing courts are required to make "independent decision[s] based upon a preponderance of the evidence." Board of Education v. Rowley, 458 U.S.176, 205 (1982), citing S.Conf.Rep.No.94-455 at 50, U.S. Code Cong.& Admin.News 1975,p.1503. This Court has also held that the Congress intended the procedures provided in Section 1415, culminating in state or federal court review to be a "comprehensive scheme" carefully tailored to assure the vindication of the equal protection rights of handicapped children. Smith v. Robinson, supra,

104 S.Ct.at 3468. The Act "establishes an enforceable substantive right to a free appropriate education." Id.

The EAHCA is clearly remedial. Doe v. Brookline, supra, 722 F.2d at 919. As a remedial statute, its provisions should be interpreted generously to further the important goals which Congress intended to achieve. Id., See also Northeast Marine Terminal Co. v. Caputo, 432 U.S.249,268 (1977). Moreover, the authority specifically vested by Section 1415(e)(2) is a broad grant of equitable power designed to give the courts flexibility in pursuing Congressional objectives. Brookline, supra, 722 F.2d at 919. A Congressional grant of equitable authority to the courts indicates an intention to give the courts flexibility in fashioning a remedy to make plaintiffs "whole" for injuries suffered on account of failure to comply with statutory requirements. Albemarle Paper Co. v. Moody,

422 U.S.405,418 (1975). See also Porter v. Warner Holding Co., 328 U.S.395,398-400 (1945) (The comprehensiveness of equitable jurisdiction should not be limited unless there is a clear legislative command to do so). As the First Circuit indicated in an earlier case on this subject, it is difficult to find in the statutory scheme of the EAHCA a "necessary and inescapable inference" that the reviewing court's traditional equity power to design appropriate remedies was somehow intended to be limited or denied. Brookline, supra, 722 F.2d at 917-18.

Especially given this Court's decision that Congress intended the EAHCA to be the exclusive means of vindicating the equal protection rights of handicapped children to receive appropriate educational services, Smith v. Robinson, supra, 104 S.Ct. at 3468, it is critical that the Act not be interpreted in a manner which will foreclose elements of relief that are essential

to furthering the goals of the statute. The task then is to determine what Congress intended. Id.

B. The authority of a reviewing court under 20 U.S.C. §1415(e)(2) to grant "such relief as the court determines is appropriate" includes restitution or reimbursement to parents for tuition necessarily paid to obtain an appropriate education for their child.

Defendants insist on referring to the relief sought by plaintiffs in this case as "damages," see e.g., Brief of Petitioners at 20 and at least one court has found that the EAHCA provides a damages remedy. Boxall v. Sequoia U.High School District, 464 F.Supp. 1104,1112 (N.D.Cal.,1979). Another Circuit Court of Appeals rejected a "general damages" remedy under the EAHCA, but found "limited damages" in the form of tuition reimbursement would be available in at least two "exceptional circumstances," when the child's physical health was at stake and

when school officials acted "in bad faith." Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir.1981). Cp.Stemple v. Board of Ed., 623 F.2d 803 (4th Cir.,1980),cert.denied 450 U.S.911 (1981). A critical flaw in both petitioner's and the Anderson court's analysis is that it is not necessary to infer a "general damages" remedy to find that restitution or reimbursement of tuition is an appropriate component of the general equitable authority explicitly granted by Section 1415(e)(2).

Reimbursement of the tuition costs necessarily incurred by parents in order to assure appropriate educational services for their child is a very different and more limited type of remedy than a general damages remedy. Brookline, supra, 722 F.2d at 920, Doe v. Anrig II, 561 F.Supp.121, 127 (D.Mass.1983). See also Marvin H. v. Austin Indep.School District, 714 F.2d 1348,

1356 (5th Cir.,1983). The difference is that reimbursement of parents in these circumstances is, as the Court of Appeals appropriately characterized it, Burlington, supra, 736 F.2d at 799, Brookline, supra, 722 F.2d at 919, an element of equitable relief traditionally used by Courts to make an injured party whole. See, e.g. Albemarle Paper Co., supra, 422 U.S. at 416-19.(Title VII of the Civil Rights Act of 1964 should be interpreted in such a way as to allow relief which will make persons whole, including back pay awards, for injuries suffered on account of unlawful employment discrimination). Even when Congress has substituted limiting language regarding relief, district courts have retained the "historic power of equity" to award restitution as an element of relief. Id., at 416, citing Mitchell v. DeMario Jewelry, 361 U.S.288 (1960). Analyzing reimbursement of tuition as an element of equitable relief, rather than an item of

"general damages" at law, will allow this Court to more coherently articulate the statutory scheme and Congressional intent, including balancing of competing interests, in a manner which avoids the unexplained and somewhat artificial "exceptions" to the no-damages rule to which the Anderson court resorts. See Department of Education, State of Hawaii v. Katherine D., 722 F.2d 809 (9th Cir.1984)

Once the intent to create an equitable remedy is recognized, the Court should assume that Congress acted "cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." Mitchell, supra, 361 U.S.at 292.[10] Amici believe that the First Circuit correctly analyzed the availability of reimbursement

[10]This Court in Mitchell made it clear that the principles relating the equitable authority of federal courts enunciated in Porter, supra, are not limited to wartime statutes or statutes which explicitly authorize a reimbursement remedy. Mitchell, supra at 291.

as an equitable remedy, except to the extent that the Court sanctions reimbursement awards against parents.[11] Town of Burlington, supra at 801. See also Brookline, supra, 722 F.2d at 921.

The Fourth Circuit Court of Appeals differs mostly sharply with the First Circuit on the reimbursement issue. Stemple v. Board of Education, supra. The Stemple court's approach was to impose a limit on a court's authority under Section 1415(e)(2) on the basis that Section 1415(e)(3) is a barrier to a change of placement by parents. Id., 623 F.2d at 898. As we have demonstrated (Part II of this brief), Section 1415(e)(3) was not intended to be a barrier to a parent's choice to place his or her child in a private school paid for by the parent. The Stemple court's admission that the state could not enforce such a prohibition, Id.,

[11] See discussion infra, footnote 12.

supports this analysis, since an interpretation of a statutory scheme critical elements of which are unenforceable at very least lacks coherence, and more likely is a misreading of Congressional intentions. See discussion, Part I, supra.

The Seventh Circuit's decision in Anderson v. Thompson, supra, is quite consistent with the First Circuit's analysis of Section 1415(e)(2) and (e)(3). Although Anderson initially finds that §1415(e)(2) does not include a "general damages" remedy, Id. 658 F.2d at 1210, 1213, the Court finds that tuition reimbursement is available in "exceptional circumstances." Id. at 1213-14. Thus the Seventh Circuit agrees with the First Circuit that Congress did not intend to bar any reimbursement to parents. Id. Where amici differ with the Anderson court, and even with the First Circuit, is how an analysis of statutory goals inform a determination of when restitution or reimbursement is appropriate.

As we discuss in Part I of this brief, the underlying Congressional purpose behind enactment of the EAHCA was to assure appropriate educational services for handicapped children. See Smith, supra; Rowley, supra. To achieve this goal Congress established a system of substantive and procedural protections, including substantial parental involvement, but did not intend to displace traditional parental rights to obtain appropriate educational services for their children. See discussion, supra. The Anderson court correctly points out that Congress included the (e)(3) provision to minimize disruption of a child's educational program during the decisionmaking process. Anderson, supra, 658 F.2d at 121. Even if this Court does not agree with our analysis that (e)(3) does not apply to parental transfers, see discussion supra, it should reject both the Anderson and Stemple resolutions of the

reimbursement issue because neither use the primary purpose of the statute, providing appropriate educational services to handicapped children, as the informing principle.

As the First Circuit cogently observes, the Stemple court's rule treats special needs children "as though they were nonperishable commodities able to be warehoused until termination of in rem proceedings." Burlington, supra, 736 F.2d at 798. The Anderson rule would sanction parental transfer by reimbursement if there were serious risk of injury to the child's physical health or if school officials were acting in "bad faith." See Anderson, supra, 658 F.2d at 1213-14. However, if a parent initiated a transfer on the basis of a belief that circumstances met the Anderson standards, but a court later determined that the risk of injury was not "serious" or that school officials were wrong but not acting in "bad faith," then the parent would not be reimbursed. This

would be true even if the transfer was from a patently inadequate program to one which proved to be appropriate for the child. This reading would allow parents who act in furtherance of the statute's goal of obtaining education for their child to be denied a "free" education. 20 U.S.C. §1412.

Special education proceedings, including court appeals often go on for years. This case was initially filed in 1979, when both the school officials and parents agreed that the public school program which the child attended was inappropriate for him. See Burlington, supra, 736 F.2d at 789. Congress recognized that delay in obtaining appropriate remedial services for a handicapped child can be "highly injurious." Burlington, supra, 736 F.2d at 798, citing 121 Cong.Rec.37414,37416. The First Circuit correctly determined that:

> reimbursement promotes the purposes and policy of the Act.
>
> * * *
>
> If the school committee's proposed public placement is held inappropriate, then through reimbursement all parties are restored to the position the Act sought to achieve. In turn, "[f]or the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection Congress would have intended, however great the shortage of funds."

Id., citing Brookline, supra, 722 F.2d at 921 (footnotes and citations omitted). The Stemple or Anderson rules, unlike the First Circuit's rule, fail to promote the Act's goal of achieving appropriate education for handicapped children by forcing parents, who have appropriately placed their children, to suffer economic loss (beyond the costs of pursuing their administrative and judicial remedies. See Smith v. Robinson, supra) in order to obtain an appropriate program for their children in a timely manner and, to avoid potential harm caused by inappropriate educational placement. Cp Burlington, supra, 736 F.2d at 789 ("We cannot in good

faith condemn the parents for moving a child from the 'current placement' all parties had agreed to be insufficient.") Moreover, in the experience of amici the Stemple and Anderson formulations, by allowing school officials to not only delay but avoid the cost of services intended to be their responsibility, would reward those officials who fail to recognize or refuse to assure equal access to education for handicapped children, the very "evil" that Congress was attempting to alleviate with the EAHCA. See Burlington, supra, 736 F.2d at 927.

It should be made clear that the stakes are relatively high, especially for a family of moderate means. A private day program for moderately to severely handicapped students in Massachusetts can easily cost $8,000-$15,000; a residential program $20,000-$45,000. The pressures on school department officials from the school committee, fiscal officers, and other constituents

are significant. The incentive for a school department to resist obtaining appropriate but costly services are very real and the costs for a parent trying to obtain appropriate education services can be substantial.

Foreclosing reimbursement will leave many parents without a meaningful remedy despite clear violation of Congressional mandates. Cp. Cannon v. University of Chicago, 441 U.S.677 (1979)(withholding of federal funds are authorized by the EAHCA is not an effective remedy for an individual litigant). Such a result is inconsistent with the broad grant of authority by "such relief as the court deems appropriate." See discussion supra.

Moreover, it must be pointed out that the type of limited restitution described by the First Circuit is simply not an undue burden on the local education authorities. Local education agencies have a clear mandate

to provide free appropriate education, including a private placement when necessary. 20 U.S.C. §1413(a)(4); 34 C.F.R.§300.400-300.450. All the First Circuit's standard does is put the school department, parent, and student where they would have been had the school not failed to meet its statutory responsibility. See Burlington, supra, 736 F.Supp.at 798. In fact it leaves the school in a somewhat better position because it is allowed to delay payment until the restitution order is entered. Municipal government routinely appropriates funds to meet such expenses, past and future, and supportive funding is available from numerous state and federal sources. The First Circuit standard for reimbursement for parents' tuition expenses is strongly supported by the traditional analysis of equitable authority and does not impose any

new burden on school officials.[12] It is an appropriate analysis of Congressional intent and should be applied in this case by the Court.[13]

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[12]Amici do differ with the First Circuit in its analysis of the appropriateness of orders requiring parents to reimburse school departments. See Burlington, supra, 736 F.2d at 800. Under the First Circuit's system if a parent is able to convince a U.S.District Court judge that they do not only have a good faith opinion that their child belongs in a private school program, but can show likelihood of success and irreparable harm, they may be able to obtain a preliminary injunction requiring the local educational agency to pay for the placement pending appeal. However, if the parents ultimately lose, they may be ordered to reimburse the town. Id. Such a risk for a parent may substantially defer their attempting to expedite the placement and is completely unfair for a parent who is acting in good faith and is able to meet the preliminary injunction standard. Parents in such circumstances should be able to rely on the judgment of a trial court judge that they are not only acting in good faith, but are likely to succeed on the merits by showing that the services which they seek are those which should be publicly funded under the EAHCA.

[13]The authority to reimburse a parent's special education tuition expenses which should have been the responsibility of local school officials is well established in Massachusetts law. See Amherst-Pelham Regional School District v. Department of Education, 367 Mass.480 (1978). In Amherst-Pelham, the Supreme Judicial Court of Massachusetts analyzed G.L.c.71B, the Massachusetts

CONCLUSION

For the reasons stated above, amici urge that the holding of the Court of Appeals for the First Circuit that parents' unilateral transfer of their child is irrelevant to 20 U.S.C. §1415(e)(3) and does not constitute a bar to reimbursement should be affirmed. Additionally, we urge this Court to affirm the appellate court's ruling that reimbursement is available under the EAHCA as a matter of equitable relief under 20 U.S.C. §1415(e)(2).

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footnote, cont'd

complement to the EAHCA, and found that the state law provisions similar to 20 U.S.C. §1415(e)(3) are intended to prevent unnecessary disruption of a child's educational program, but in no way limit school officials' obligation to provide an appropriate program. Id. The S.J.C. found that parents may enforce this obligation by obtaining reimbursement of tuition when the program chosen by the parent is ultimately determined to be appropriate for the child. Id. This Court should carefully consider the resolution by a state's highest court of the policy issues at stake here and more importantly should give such state-created procedural and substantive rights substantial, perhaps controlling weight when determining the rights and duties of citizens of that state. See Mills v. Rogers, 457 U.S.291, 300, 303-4 (1982).

Respectfully submitted,

Kathleen B. Boundy
Margo Haist Wallack
Center for Law and Education
6 Appian Way
Cambridge, MA 02138
(617) 495-4666

Richard F. Howard
Stanley J. Eichner
Developmental Disablities
Law Center
11 Beacon Street, Suite 925
Boston, MA 02108
(617) 723-8455

ATTORNEYS FOR THE AMICI CURIAE

APPENDIX

Inquiry by: Roger Brown
Association Commissioner and
Director
State Department of Special
Education
31 St. James .venue
Boston, Massachusetts 02116

Digest of Inquiry
(Oct.19,1977)

Is state administrative procedure, providing that filing of petition for judicial review of SEA due process hearing shall not operate as stay of implementation of SEA decision, inconsistent with requirement of Reg.121a.509 that hearing is final unless appealed?

Text of Response
(May 4, 1978)

As we understand your concerns, you believe it is important for the Massachusetts Department of Education to be able to enforce its hearing decisions without waiting for any judicial proceedings to be completed. You indicated this would create the potential for great

harm to children, because it could mean a child might remain in an inappropriate program for years, when a party appealed the decision of the hearing officer.

The Bureau could approve a State procedure which allowed the Massachusetts Department of Education to implement the decision of a hearing officer when the Department and a parent of the handicapped child agreed that the decision should be implemented, but the local educational agency disagreed with the decision and was appealing the decision in the courts. However, the MDOE could not implement a decision which the parents were appealing in the courts.

This interpretation is based on §615(a)(3) of the Education of the Handicapped Act [§1415] which provides that unless the State or local educational agency and the parents agree, the child must remain in the current educational placement during the pendency of any

administrative or judicial proceeding.

Whether the local educational agency would be responsible for the costs of the placement during the pendency of any proceeding in which the local educational agency were challenging the hearing officer's decision is a matter between the State and local educational agency. Of course, the parents could not be charged.

William Halloran
State Plan Officer
Field Service Branch/
DAS
Bureau of Education
for the Handicapped

From 2 EHLR 211:28